

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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JUNE 26 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0400-PR
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JEROME EDWIN ARNOLDI, JR.,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-31033

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Jerome Arnoldi, Jr.

Tucson
In Propria Persona

H O W A R D, Presiding Judge.

¶1 In 1991, petitioner Jerome Arnoldi, Jr. was convicted after a jury trial of twenty counts of sexual offenses involving his four minor daughters. Arnoldi appealed his

convictions and sentences; we affirmed all but one of his convictions and remanded the case for resentencing on seven of the remaining convictions. *State v. Arnoldi*, 176 Ariz. 236, 243, 860 P.2d 503, 510 (App. 1993).

¶2 In 1995, Arnoldi filed his first petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., alleging trial counsel had been ineffective, and the trial court denied relief. We consolidated Arnoldi’s petition for review with an appeal he had filed after he was resentenced and denied relief, affirming his sentences on remand. *State v. Arnoldi*, Nos. 2 CA-CR 95-0136, 2 CA-CR 96-0344-PR (consolidated) (memorandum decision filed Jan. 29, 1997). We noted Arnoldi had failed to establish he had been prejudiced by trial counsel’s alleged deficiencies, writing, “No matter what strategy trial counsel could have employed, [Arnoldi] was still faced with the interrelated testimony of his four daughters about a year-long history of molestations.”

¶3 Arnoldi filed a second notice of post-conviction relief in April 2006 and in the petition that followed alleged (1) the state had failed to disclose exculpatory evidence to the defense or the grand jury, (2) he was denied a fair and impartial grand jury hearing, (3) he was innocent of the charges, (4) jurors “received outside help in their decision making,” (5) he was “not allowed to be examined by a doctor of his choosing” to determine whether he was competent to stand trial, (6) all of the aforementioned factors resulted in an unfair trial, (7) ineffective assistance of trial counsel, and (8) ineffective assistance of appellate and post-conviction relief counsel.

¶4 The trial court summarily denied relief, concluding:

The claims relative to the original indictment are seventeen years waived and untimely. All other claims, to the extent that they are asserted in anything but a conclusory form, are precluded either by actual litigation at both the trial court level and in the Arizona Court of Appeals or are precluded because they are untimely raised. No constitutional violations are visible and no colorable unprecluded claims can be discerned.

¶5 In his petition for review, Arnoldi argues the trial court violated his “1st Amendment right of Access to Court,” his “6th Amendment right to Appeal,” and the principle of stare decisis by denying his petition for post-conviction relief. He contends that “[e]ven though [he] ha[d] filed previous petitions” omitting the claims he made in this Rule 32 proceeding, “new information has come to light,” and the omissions are excusable because he is “mentally challenged, especially in law.”

¶6 “In Arizona, the appeal is the post-conviction proceeding of primary importance,” *State v. Carriger*, 143 Ariz. 142, 145, 692 P.2d 991, 994 (1984), and Arnoldi has had his appeal. Rule 32 “is not designed to afford a second appeal”—or a third—and “is not intended to unnecessarily delay the renditions of justice or add a third day in court when fewer days are sufficient to do substantial justice.” *Id.* “It is the petitioner’s burden to assert grounds that bring him within the provisions of [Rule 32],” and he “must strictly comply with Rule 32 or be denied relief.” *Id.* at 146, 692 P.2d at 995. Arnoldi has failed to sustain his burden because all of the claims he raises are either precluded or unsubstantiated. *See* Ariz. R. Crim. P. 32.6(c) (court shall summarily dismiss petition if,

after identifying precluded claims, no remaining claim presents material issue of fact or law entitling defendant to relief and no purpose would be served by further proceedings).

¶7 In his reply to the state’s response to his petition below, Arnoldi cited *State v. Pruett*, 185 Ariz. 128, 912 P.2d 1357 (App. 1995), as authority that his claim for ineffective assistance of appellate or Rule 32 counsel may be brought in a successive Rule 32 petition, but he misreads that case. *Pruett* addressed the rights of a pleading defendant, for whom the “first petition for post-conviction is ‘*the* appeal for a defendant pleading guilty.’” *Id.* at 131, 912 P.2d at 1360, *quoting Montgomery v. Sheldon*, 182 Ariz. 118, 119, 893 P.2d 1281, 1282 (1995) (supp. op.) (emphasis in *Montgomery*). When a defendant has been convicted after trial, a claim of ineffective assistance of trial or appellate counsel must be brought in a timely Rule 32 proceeding; if it is not, a defendant is “precluded from relief” on that claim. *See* Ariz. R. Crim. P. 32.2(a), (b); *see also State v. Mata*, 185 Ariz. 319, 336-37, 916 P.2d 1035, 1052-53 (1996) (defendant convicted after trial has no right to effective assistance of post-conviction relief counsel).

¶8 Arnoldi has not been denied his right to appeal or his right of access to the court, and he has cited no basis for us to conclude the trial court failed to follow relevant precedent under the doctrine of stare decisis. To the contrary, we conclude the trial court has correctly applied the law.

¶9 As the trial court noted, Arnoldi stated his claims in his post-conviction relief petition in a conclusory fashion, unsupported by evidence or even specific allegations. *See*

Ariz. R. Crim. P. 32.2(b) (claims based on Rule 32.1(d), (e), (f), (g), or (h) not subject to preclusion if defendant provides meritorious reasons substantiating the claim and excusing the failure to raise it in previous petition). Although he maintains in his petition for review that “new information has come to light,” Arnoldi did not identify that information—much less newly discovered material facts that would entitle him to relief—in his petition below. *See* Ariz. R. Crim. P. 32.1(e) (authorizing claim for relief based on facts that “probably would have changed the verdict” that were undiscovered, despite reasonable diligence, until after conviction); *see also State v. Bilke*, 162 Ariz. 51, 52, 781 P.2d 28, 29 (1989) (newly discovered evidence “must appear on its face to have existed at the time of trial”).

¶10 The only other claim Arnoldi raises that arguably falls within an exception to preclusion under Rule 32.2(b) is his claim of “actual innocence.” But to prevail on a claim for relief under Rule 32.1(h), a defendant must “demonstrate[] by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt.” The only positive “exculpatory evidence” Arnoldi identified in his petition below was his allegation that he was not living in the same home with his daughters at the time the offenses were committed; he otherwise refers only generally to defense affidavits and defense witnesses and complains about an absence of medical evidence at trial. Arnoldi has not stated a colorable claim for relief pursuant to Rule 32.1(h). *See State v.*

Runnigeagle, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (colorable claim is “one that, if the allegations are true, might have changed the outcome”).

¶11 Similarly, we reject Arnoldi’s contention that, to the extent his claims are precluded by his failure to raise them in previous proceedings, his failure should be excused because he faces mental challenges and is not required “to know the law to get justice.” Arnoldi has had assistance. He was represented in his appeal and his first Rule 32 proceeding by counsel “responsible for evaluating the trial record and for determining the most promising issues to present.” *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995). “Once the issues have been narrowed and presented, appellate counsel’s waiver of other possible issues binds the defendant, and those waived issues cannot be resurrected in post-conviction proceedings.” *Id.*

¶12 This court will not disturb a trial court’s ruling on a petition for post-conviction relief unless the lower court manifestly abused its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse of discretion in the trial court’s dismissal of Arnoldi’s petition. Accordingly, although we grant the petition for review, we deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge